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FILED
JUN 2 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 117

HENRY PIRTLE,
Petitioner,

vs.

H. B. BROWN, CHRISTIAN KOPP and W. F. WARREN, Individually, and as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the precinct or voting place at the Courthouse in Tracy City, Tennessee, and ROY H. BEELER, as Attorney General and Reporter of the State of Tennessee, in his official capacity,
Respondents,

TRANSCRIPT OF RECORD

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

CRAMPTON HARRIS,
727 Frank Nelson Bldg.,
Birmingham, Alabama,
Attorney for Petitioner.

NAT TIPTON,
Asst. Attorney General,
Nashville, Tennessee,
Attorney for Respondents.

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United States District Court

Middle District of Tennessee

Winchester Division

HENRY PIRTLE,
Plaintiff,

vs.

H. B. BROWN, CHRISTIAN KOPP and W. F. WARREN, Individually, and H. B. BROWN, CHRISTIAN KOPP and W. F. WARREN as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the Precinct or Voting Place at the Courthouse in Tracy City, Tennessee,
Defendants.

BILL OF COMPLAINT

(Filed September 8, 1939)

1. Jurisdiction is founded on the existence of a Federal question. The action arises under the Constitution and Laws of the United States, and particularly under Article I, Section 2, and the Fourteenth Amendment to the Constitution of the United States, and Title 28 of the Judicial Code of the United States, Section 41, sub-paragraphs 11 and 14, and Title 28 of the Judicial Code of the United States, Section 400.

2. Plaintiff, HENRY PIRTLE, is a male citizen of the United States, and a resident of Tracy City, Grundy County, Tennessee, and is twenty-five (25) years of age.

Plaintiff lives in the Fifth Civil District of Grundy County, Tennessee. The voting place of a resident living at the place where the plaintiff now lives is at the Courthouse in Tracy City, Grundy County, Tennessee.

Plaintiff has continuously lived at the place where he now lives since he became twenty-one (21) years of age, and has heretofore voted at the polling place at the Courthouse in Tracy City, Grundy County, Tennessee, provided for voters of the Fifth Civil District, having voted at that place in that District in the Presidential Election of 1936.

3. The Defendants, H. B. Brown, Christian Kopp and W. F. Warren, have been named by the Commissioners of Elections for Grundy County, Tennessee, as Judges for the precinct or voting place at the Courthouse in Tracy City, Tennessee, where voters of the Fifth Civil District will cast their votes to superintend the election at that precinct or voting place in a special election to be held September 13, 1939.

4. The Governor of the State of Tennessee has called a special election for the Third Congressional District of Tennessee on September 13, 1939, at which election there will be elected a successor in the Congress of the United States to fill out the unexpired term of the late Honorable Sam D. McReynolds, deceased.

5. The special election hereinabove referred to is called for the sole and specific purpose of electing a representative from the Third Congressional District of Tennessee in the Congress of the United States and no other office will be filled than the vacancy in the Congress of the United States from the Third Congressional District of Tennessee, and no persons shall be voted for in said election except candidates to fill said vacancy. In short, the special election called for September 13, 1939 is not to fill any local or State office whatsoever.

6. Article Four, Section I of the Constitution of the State of Tennessee provides that "every male person of

the age of 21 years, being a citizen of the United States, and a resident of Tennessee for twelve months, and of the County wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the General Assembly—and other civil officers for the County or District in which he resides; and there shall be no qualifications attached to the right of suffrage except that each voter shall give to the Judges of election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law, without which his vote cannot be received."

It further provides that all male citizens of the State shall be subject to the payment of poll taxes within such ages as may be prescribed by law.

7. The Legislature of the State of Tennessee has provided in Section 2029 of the Code of Tennessee, 1934, Annotated, that: "The satisfactory evidence to be furnished by the voter to the Judges of the election, whether general or special, whether National, State, County, or Municipal, that he has paid the poll tax, contemplated by the Constitution, assessed against him, if any, for the year next preceding said election, shall consist of the original poll tax receipt, or a duly certified duplicate and copy of the same, or the duly authenticated certificate set out in Section 2042—or shall make affidavit in writing, and signed by the voter that he has paid his poll tax and that his receipt is lost or misplaced, which affidavit shall be filed with the said judges,—or that his name appears upon the certified list of voters of his voting precinct, which list, as well as one for each District in the County, is to be made out and furnished by the Trustee or other officer charged with such duties of each County to the Secretary of the State."

The Legislature of the State of Tennessee assessed a poll tax for the year 1938 of $2.00 against all male citizens of the State of Tennessee between the ages of 21 and 50 years.

8. This Plaintiff is a male citizen of the State of Tennessee of the age of 25 years and is a citizen of the United States, and has been a resident of the State of Tennessee and of Grundy County, Tennessee, continuously for the past four years, and will remain such a resident up to and after the day of the special election herein referred to, to-wit: September 13, 1939.

This Plaintiff, however, has not paid the poll tax assessed against him under the Laws of the State of Tennessee, for the year 1938.

9. This Plaintiff desires to vote for a representative in the Congress of the United States from the Third Congressional District of Tennessee in the special election hereinabove referred to. On September 4, 1939, this Plaintiff addressed a communication to each of the defendant judges of election for the precinct or voting place at the Courthouse, Tracy City, Grundy County, Tennessee, informing said defendant judges of his desire to vote and of the fact that he had fulfilled all of the requirements of suffrage exacted by the Constitution and Laws of the State of Tennessee, except payment of the poll tax for the year next preceding the election and asked each of said judges whether or not he would be allowed to vote in said special election, which inquiry more fully appears from Exhibit "A", hereto attached and made a part hereof, the same as if set out herein.

10. Plaintiff further alleges that said defendants informed him, in substance, that he would not be allowed to cast a vote because he had not paid his poll tax, all as more fully appears in Exhibit "B", hereto attached and made a part hereof the same as if set out herein.

WHEREFORE, Plaintiff demands that the Court adjudge:

1st. That Plaintiff is entitled to vote for a representative in the Congress of the United States from the Third Congressional District of Tennessee in the special election to be held on September 13, 1939;

2nd. That each of the Defendants, H. B. BROWN, CHRISTIAN KOPP and W. F. WARREN, be restrained from pro-

hibiting, molesting, interfering with or preventing the Plaintiff from voting in said special election and be enjoined from informing, directing, or advising in any manner any clerk or election official to deny the Plaintiff the right to cast his vote in said election, or to refuse to receive the vote of the Plaintiff in said election.

3rd. That Plaintiff is entitled to vote in all subsequent elections to elect Senators from the State of Tennessee and to elect representatives in the Congress of the United States, from the State of Tennessee, so long as Plaintiff fulfills the requirements of residence prescribed by the Constitution of Tennessee, as a condition of suffrage, regardless of whether or not the Plaintiff shall have paid any poll taxes assessed against him under the laws of the State of Tennessee.

(Signed) HARRIS & BROWN,
(Signed) HERBERT G. B. KING,
Attorneys for Plaintiff.

STATE OF TENNESSEE }
GRUNDY COUNTY , } ss:

Before me, the undersigned authority in said County and State aforesaid, personally appeared HENRY PIRTLE who being by me first duly sworn deposes and says that he is the Plaintiff in the above styled cause and that the facts stated in the foregoing Complaint are true and correct.

(Signed) HENRY PIRTLE.

Sworn to and subscribed before me, this 8th day of September, 1939.

(SEAL) (Signed) MADGE ANDERSON,
Notary Public.

My commission expires May 3, 1943.

EXHIBIT "A"

Dear Sir:

I am informed that you will be a judge at the voting box at the Court House at Tracy City, Tennessee, where the voters of the Fifth Civil District will cast their votes in the special election called for September 13th, 1939 by the Governor of the State of Tennessee for the purpose of electing a Representative from the Third District of Tennessee in the House of Representatives of the United States. For that reason I write this letter to you and make the following inquiry of you:

I am twenty-five years of age. I have lived in Grundy County, Tennessee, all my life. By occupation I am a coal dealer, with my business in Grundy County, Tennessee. I live at Tracy City and the place where I should vote is the box at the Court House at Tracy City in which the voters of the Fifth Civil District cast their votes. I have been engaged in business and have been earning my living since I was twenty-one years of age and before. I voted in the Presidential Election in 1936 at the polling place in the Court House at Tracy City, Grundy County, Tennessee, and my residence has been in the same civil district continuously since that time.

I make this inquiry of you: will I be allowed to vote in the special election on September 13th next. I make this inquiry because I have not paid the poll tax required of me by the laws of the State of Tennessee.

I call your attention to the fact that this election is called to elect a Representative from the Third District in the House of Representatives of the United States and is not called for the election of any other official, state or federal.

I feel that I have a perfect legal right to vote for a Representative in the Congress of the United States and in this special election, regardless of the fact that I have not paid my poll tax.

Please answer this inquiry at your earliest possible convenience.

Sincerely yours,

(Signed) HENRY PIRTLE.

EXHIBIT "B"

Henry Pirtle,
Tracy City, Tennessee

Dear Sir:

I have before me your letter of September 4 asking me whether you will be allowed to vote in the special election called by the Governor of Tennessee on September 13, 1939. You state in your letter that you are a resident citizen of Grundy County, that your business is in Grundy County, and that you have heretofore voted in the Presidential Election of 1936. In fact, your letter seems to me to fulfill every requirement to entitle you to vote in this election except one. You state that you have not paid your poll tax. That payment is a condition precedent to your right to vote in the special election on September 13. My answer to your question, therefore, is that you will not be allowed to cast a vote in the voting place in which you normally would vote if you had paid your poll tax.

In making this answer to your question, I ask that you do not take it as necessarily expressing my views, but rather as an expression of my opinion of what the law requires me to do. Regardless of how I personally feel about the payment of poll tax as a condition precedent to the right of suffrage, it is my duty as an election official to follow the laws of the State of Tennessee. This letter, therefore, is a statement of what I, as an election official, will do.

Sincerely yours,

(Copy) Signed H. B. Brown.
(Copy) Signed Christian Kopp.
(Copy) Signed W. F. Warren.

(3 identical letters)

Bond

We, the undersigned, Defendants in this Cause, do hereby accept service of the foregoing Complaint and do waive any and all other service and do hereby consent that this Cause may be set down for hearing on either Monday, September 11, 1939, or Tuesday, September 12, 1939, said hearing to be at the United States District Courthouse in Nashville, or at such other place as the Judge may designate.

Dated, this September 8th, 1939.

(Signed) W. G. Warren,
(Signed) H. B. Brown,
(Signed) Christian Kopp.

BOND

(Filed September 11, 1939)

UNITED STATES DISTRICT COURT
Middle District of Tennessee

Henry Pirtle, *Plaintiff,* vs. H. B. Brown, Christian Kopp and W. F. Warren, Ind., Etc., *Defendants.*	No. 9 Winchester Civil

We, Henry Pirtle, as principal, and United States Fidelity & Guaranty Co., as surety, acknowledge our-

selves indebted to H. B. Brown, Christian Kopp and W. F. Warren, Ind. & Etc., in the penal sum of ($250.00) Two Hundred and Fifty Dollars, good and lawful money; to be void, however, if the said Plaintiff shall prosecute with effect an action which it is about to commence in the United States District Court for the Middle District of Tennessee, against H. B. Brown, Christian Kopp and W. F. Warren, Ind., and H. B. Brown, Christian Kopp, W. F. Warren, as Judges of Election, or, if it fails to do so, shall pay all such costs and damages as may be awarded against it by the court having cognizance thereof.

(Signed) Henry Pirtle,
Principal,
(Signed) United States Fidelity & Guaranty Co.,
Surety,
By (Signed) W. D. Gale,
Attorney-in-Fact.

(CORPORATE SEAL)

PETITION OF ROY H. BEELER, ATTORNEY GENERAL AND REPORTER OF TENNESSEE, TO BE PERMITTED TO INTERVENE IN THE ABOVE STYLED CAUSE

(Filed September 11, 1939)

Comes Roy H. Beeler, in his capacity as Attorney General and Reporter of the State of Tennessee, and respectfully shows to the Court as follows:

I.

That he is the duly elected, qualified and acting Attorney General of the State of Tennessee.

II.

That the above captioned suit was duly filed in this Court by the plaintiff against H. B. Brown, Christian Kopp and W. F. Warren, who are averred therein to be Judges of Election for the 5th Civil District of Grundy County, Tennessee, the averred residence of the plaintiff.

III.

That the purpose of the suit is apparently to obtain a declaration at the hands of this Court that Section 2029 of the Code of Tennessee of 1932 and that Article IV, Section 1 of the Constitution of the State of Tennessee, each of same requiring the payment of poll tax prior to voting, are invalid as being in conflict with Article I, Section 2 of the Constitution of the United States, and likewise in conflict with Amendment 14 to the Constitution of the United States.

IV.

That the parties named as defendants hereto are individual citizens of this state who have been selected as Judges of Election in a special election to be held in the Third Congressional District on September 13, 1939, and have no real interest in the maintenance and validity of the laws of this state requiring the prepayment of poll tax as a condition precedent to voting and therefore are merely made nominal defendants thereto.

V.

That your petitioner by virtue of his official position is the chief law enforcement officer of the State of Tennessee and as such is vitally interested in maintaining the validity of the above quoted sections from the Constitution of Tennessee and of the Code of Tennessee and

is likewise vitally interested in seeing that there be adequately presented to this Court various arguments and authorities which, in his judgment, tend to maintain the validity of such sections. Copy of the pleading sought to be filed by the petitioner accompanies this petition for intervention.

Premises considered, the petitioner prays that he be permitted to intervene on behalf of the State of Tennessee in this cause and court and to make defense to the suit herein filed in his official capacity as such Attorney General and Reporter and that he have general relief.

Notice of the filing of said suit having come to your petitioner's attention for the first time on September 8, 1939, service of copy of this intervening petition upon the parties to this suit has not been made at the present time but will be made at the earliest convenient opportunity.

(Signed) Roy H. Beeler,
Attorney General and Reporter
for the State of Tennessee.

State of Tennessee, }
Davidson County } ss:

I, Nat Tipton, make oath in due form of law that I am one of the Assistant Attorneys General of the State of Tennessee, I am familiar with the facts stated in the foregoing petition and that the matters stated therein as facts are true to the best of my knowledge, information and belief. I further make oath that this affidavit is made by me rather than by petitioner, Roy H. Beeler, as Attorney General of the State of Tennessee, because the said Roy H. Beeler is at the present time absent from the State of Tennessee and will continue to be so absent until on or about October 1, 1939, and therefore unavailable for the purpose of making this affidavit.

(Signed) Nat Tipton.

Subscribed and sworn to before me, this 9th day of September, 1939.

(seal) (Signed) Clara S. Gold, *Deputy Clerk.*

ANSWER OF ROY H. BEELER, ATTORNEY GENERAL AND REPORTER OF THE STATE OF TENNESSEE

Comes now Roy H. Beeler, Attorney General and Reporter of the State of Tennessee, having first prayed for and obtained leave to intervene in the above styled cause and court in his official capacity as such Attorney General and Reporter, and for answer to the complaint of the plaintiff says:

I.

That Section 2 of Article I of the Constitution of the United States provides that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature," thereby recognizing the right of the State Government to impose limitations upon the right to vote for members of Congress.

II.

Further answering he says that the right to vote in elections is not conferred by any provision of the Constitution of the United States but on the contrary, emanates from the states themselves and that therefore plaintiff's attack upon the validity of the poll tax statutes and constitutional provisions of the State of Tennessee is not well founded since said statutes and constitutional provisions do not contravene any provisions of the Constitution of the United States since that document leaves to the several states the power of fixing the qualifications of electors of the most numerous branch of the State Legislature.

III.

Further answering, this respondent avers that the levying of a poll tax by the state in the amount of $1.00 and the levying of a poll tax in like amount as permitted by statute by the County of Grundy does not constitute an unreasonable limitation upon the right to vote but on the contrary, constitutes a reasonable restriction upon the right of suffrage.

And now having fully answered, this respondent prays that the plaintiff's petition be dismissed and that he be decreed to be entitled to no declaratory relief at the hands of this Court.

(Signed) Roy H. Beeler,
Attorney General and Reporter for the State of Tennessee.

(Signed) E. F. Smith,
" W. F. Barry,
" Nat Tipton.

Service of copies of Intervening Petition duly acknowledged and the five-day requirement of service expressly waived.
This September 11, 1939.

(Signed) Crampton Harris,
Of Counsel for Plaintiff.

OPINION

(Filed September 11, 1939)

The plaintiff brings this action to assert his alleged right to vote for a member of the House of Representatives of the United States Congress, without having first paid a poll tax as provided by the Constitution and laws enacted pursuant thereto of the State of Tennessee.

1. Section II of Article I of the Constitution of the United States provides as follows:

Section II: The House of Representatives shall be composed of members chosen every second year by the people of the several states and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation from any state the Executive Authority thereof shall issue writs of Election to fill such vacancies.

2. Section I of Article IV of the Constitution of the State of Tennessee fixes the qualifications of Electors voting for electors of the most numerous branch of the State legislature as follows:

Section I: Every male person of the age of twenty-one years being a citizen of the United States and a resident of the State for twelve months, and of the County wherein he may offer his vote for six months next preceeding the day of the election, shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage except that each voter shall give to the judges of election where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law without which his vote cannot be received. And all male citizens of the State shall be subject to the payment of poll taxes and the performance of military duty within such ages as may be prescribed by law.

3. The Legislature of the State of Tennessee in prescribing the period for payment of poll tax as a prerequisite of voting and defining satisfactory evidence of the payment thereof has enacted into law the following:

Section 2027, Code of Tennessee for 1932—Every person in this State who is otherwise a qualified voter under the Constitution and laws, shall as a condition precedent to the exercise of voting, furnish to the judges of election satisfactory evidence that he has paid the poll tax,

if any, assessed against him for the year next preceding the election, not later than sixty days prior to the day of said election, without which his vote shall not be received.

Section 2029 of the Code of Tennessee defines satifactory evidence of the payment of poll tax as being, the original poll tax receipt, or a duly certified duplicate and copy of same, or the duly authenticated certificate provided for by Section 2042 when said tax has been paid to a constable or an affidavit in writing signed by the voter that he has paid his poll tax and the receipt has been lost or misplaced.

We have examined the opinion of the Court in the case of *Breedlove* v. *Suttles,* decided December 6, 1937, and reported in Volume 302 of the United States Reports, at page 277, and we find in that case the appellant contended that the privilege of voting for Federal officers is one to which he was entitled unrestricted by a tax unreasonably imposed through State invasion of his rights as a citizen of the United States; that as such citizen, he was entitled to participate in the choice of electors for the President and Vice-President of the United States and of Senators and Representatives in Congress, and that no State could exercise its taxing power so as to destroy this privilege. The Court held that payment of the poll tax as a prerequisite was not required for the purpose of denying or abridging the privilege of voting; it did not limit the tax to electors. Aliens were not there permitted to vote, but the tax was laid upon them if within the denied class. It was not laid upon persons sixty or more years of age, whether electors or not, and that exaction of payment before registration undoubtedly serves to aid collection from electors desiring to vote, but that use of the State's power is not prevented by the Federal Constitution. Citing the case of *Manguano Company* v. *Hamilton,* 292 U. S. 40.

The Court further held that to make payment of poll tax a prerequisite of voting is not to deny any privilege or immunity protected by the 14th Amendment, and that the privilege of voting is not derived from the United

States, but is conferred by the State and save as restrained by the 15th and 19th Amendments, and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. The Court also held in that case that the payment of poll taxes as a prerequisite of voting was not repugnant to the 19th Amendment.

We are of the opinion that the decision of the Court in the Breedlove case is binding upon this Court, and the questions decided in that case, we think, are the same as in the present case.

We realize that the awarding of a declaratory judgment is within the discretion of the Court. We further realize that the time limit is for consideration. Yet, the importance of the question raised is such that we think that we should exercise a discretion and determine the case on its merits.

Therefore, a declaratory judgment will be prepared and entered in conformity with this opinion; the application for the issuance of an injunction is denied.

(Signed) ELMER D. DAVIES,
United States District Judge,

(Signed) LESLIE R. DARR,
United States District Judge.

ORDER PERMITTING INTERVENTION AND FINAL DECREE

(Filed October 6, 1939)

In this cause came Roy H. Beeler, Attorney General and Reporter of the State of Tennessee, and presented his petition to be permitted to intervene in his official capacity, accompanying said petition by copy of an answer which he proposed to file in this cause and Court and counsel for the plaintiff having expressly waived in open court service upon the plaintiff of said intervening petition and likewise, having expressly waived in open court the five-day provision for such service and having consented to the filing of such intervening petition, it is, therefore, ordered, adjudged and decreed by the Court that said intervening petition be and the same is hereby granted and Roy H. Beeler permitted to intervene in this suit and to file the answer tendered by him with such intervening petition.

Thereupon came on this cause to be heard before the Honorable Elmer D. Davies, Judge of the District Court of the United States for the Middle District of Tennessee, upon the petition of the plaintiff and the answer of the intervenor, Roy H. Beeler as Attorney General and Reporter thereto, when the Court adjudged and decreed as follows:

1. That the plaintiff, Henry Pirtle, is a resident of Grundy County, Tennessee, and a citizen of the State of Tennessee and of the United States and that he is more than 21 years of age and possesses all the qualifications necessary to constitute him a legal voter for members of Congress and members of the most numerous branch of the General Assembly of Tennessee, except that the said Henry Pirtle, although liable for poll tax under the statutes of Tennessee, has not paid the same more than sixty days prior to September 13, 1939.

2. That the Governor of this state has duly called a special election to be held at all voting precincts in the Third Congressional District on September 13, 1939, for

the purpose of electing a Representative to Congress, such special election being made necessary by the death of the incumbent of such office. The Court further finds that Grundy County, of which plaintiff is a resident and citizen, is located in the Third Congressional District and that an election will be duly held in Grundy County on said date.

3. The Court finds that the plaintiff contends that the provisions of the Tennessee Constitution and statutes requiring the prepayment of poll tax as a condition precedent to the right of the plaintiff to vote for said Representative to Congress contravene the implied provisions of the Constitution of the United States in laying a tax upon a privilege secured to the plaintiff as a citizen of the United States by Section 2, Article 1 of the Constitution of the United States and likewise contravene the provisions of the Fourteenth Amendment to the Constitution of the United States by abridging a privilege secured to the plaintiff as a citizen of the United States by Section 2, Article 1 of the Constitution of the United States, and that therefore, under paragraphs 11 and 14 of section 41 of Title 28 of the United States Code Annotated, the District Court has jurisdiction to entertain such claims; and that under section 400 of Title 28 of the United States Code Annotated, the District Court has jurisdiction to render a declaration in this cause.

4. The Court finds and declares as a matter of law pursuant to the opinion of the United States Supreme Court in *Breedlove* v. *Suttles,* 302 U. S. 277, that the provisions of the Constitution and laws of the State of Tennessee, to-wit: Section 1 of Article 4, of the Constitution of the State of Tennessee and Section 2027 of the Code of Tennessee for 1932 do not contravene the provisions, either express or implied, of the Constitution of the United States in requiring the payment of a poll tax as a condition precedent to voting for said representative to Congress, and that, therefore, plaintiff is not entitled to a declaration at the hands of this court to such effect,

but on the contrary the Court finds and declares that pursuant to the opinion above cited the privilege of voting for such representative to Congress is not a privilege secured to the plaintiff by Section 2 of Article 1 of the Constitution of the United States, and that, therefore, the said poll tax is not a tax imposed upon any privilege secured to the plaintiff by the Constitution of the United States and that, since such privilege is not secured to the plaintiff by the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States has no application and the court expressly finds and declares that the said provisions of the Constitution of the State of Tennessee and of the Code of Tennessee are valid and binding on the plaintiff.

5. The Court expressly declares that the plaintiff is not entitled to vote in the special election for members of Congress to be held on September 13, 1939, in the Third Congressional District of Tennessee without the prepayment of poll tax, he being legally liable therefor in the event of the validity of such statutes of Tennessee as apply to him.

6. The Court finds and declares that the plaintiff and his surety upon his cost bond will pay the costs of this proceeding for which execution may issue within the period prescribed by law, unless the issuance thereof be stayed by an appeal.

Done and ordered this the 6th day of October, 1939.

(Signed) ELMER D. DAVIES, *Judge.*

Approved as to form:

(Signed) NAT TIPTON,
Attorney for Intervenor,

HARRIS & BROWN,
By (Signed) CRAMPTON HARRIS,
Attorneys for Plaintiff.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

(Filed November 13, 1939)

Comes the appellant, Henry Pirtle, in the above styled cause and hereby sets forth the points on which he intends to rely on this appeal.

1. The right to vote for members of Congress is a right arising from and fundamentally based on Article I, Section II of the Constitution of the United States.

2. Rights and privileges arising out of the Constitution of the United States are not subject to State taxation in any form.

3. The Fourteenth Amendment to the Constitution of the United States, in prohibiting any State from making or enforcing any law abridging the privileges and immunities of citizens of the United States, renders invalid and unconstitutional the imposition by the State of Tennessee of a poll tax as a prerequisite to the right to vote for members of Congress.

4. Section I of Article IV of the Constitution of the State of Tennessee and Section 2027 of the Code of Tennessee for 1932 do contravene the provisions, either express or implied, of the Constitution of the United States in requiring the payment of a poll tax as a condition precedent to voting for a Representative to Congress.

(Signed) HARRIS & BROWN,
Attorneys for Appellant.

I hereby certify that I have served a copy of the foregoing on General Nat Tipton, Assistant Attorney General of the State of Tennessee.

(Signed) CRAMPTON HARRIS.

BOND

(Filed October 6, 1939)

KNOW ALL MEN BY THESE PRESENTS:

That we, Henry Pirtle, as principal, and the United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto H. B. Brown, Christian Kopp and W. F. Warren, Individually, and H. B. Brown, Christian Kopp and W. F. Warren, as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the Precinct or voting place at the Courthouse in Tracy City, Tennessee, and Roy H. Beeler, as Attorney-General and Reporter of the State of Tennessee, in his official capacity, their executors, administrators, or assigns and successors in office, in the sum of Two Hundred and Fifty ($250.00) Dollars, lawful money of the United States of America, to be paid unto the said H. B. Brown, Christian Kopp and W. F. Warren, individually, and H. B. Brown, Christian Kopp and W. F. Warren, as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the Precinct or voting place at the Courthouse in Tracy City, Tennessee, and Roy H. Beeler, as Attorney-General and Reporter of the State of Tennessee, in his official capacity, their executors, administrators or assigns and successors in office, to which payment, well and truly to be made, we do bind and pledge our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated, this 6th day of October, A. D., 1939.

WHEREAS, the above named Henry Pirtle has heretofore commenced an action in the United States District Court for the Middle District of Tennessee, Winchester Division, against the said H. B. Brown, Christian Kopp and W. F. Warren, individually, and H. B. Brown, Christian Kopp and W. F. Warren, as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the Precinct or voting place at the Courthouse in Tracy

City, Tennessee, which action was transferred to the Nashville Division of said Middle District; and,

WHEREAS, a final judgment and decree was rendered and entered in said cause on the 6th day of October, 1939, and

WHEREAS, the said Henry Pirtle has on this October 6, 1939, filed notice of appeal from said final judgment and decree to the United States Circuit Court of Appeals for the Sixth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above named Henry Pirtle shall pay all costs if his appeal is dismissed, or the judgment affirmed, or such costs as the United States Circuit Court of Appeals for the Sixth Circuit may award if the judgment is modified, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of

HENRY PIRTLE (SEAL)

CRAMPTON HARRIS,
Witness.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
By (s) W. D. GALE,
Attorney-in-Fact.

(CORPORATE SEAL)

NOTICE OF APPEAL

(Filed October 6, 1939)

Notice is hereby given that Henry Pirtle, the plaintiff above named hereby appeals to the United States Circuit Court of Appeals for the 6th Circuit from the final judgment entered in this action on October 6th, 1939, as to those parts declaring:

1. That as a matter of law pursuant to the opinion of the United States Supreme Court in Breedlove vs. Suttles, 302 U. S. 277, that the provisions of the Constitution and laws of the State of Tennessee, to-wit: Section 1 of Article 4, of the Constitution of the State of Tennessee and Section 2027 of the Code of Tennessee for 1932 do not contravene the provisions, either express or implied, of the Constitution of the United States in requiring the payment of a poll tax as a condition precedent to voting for said representative to Congress, and that, therefore, plaintiff is not entitled to a declaration at the hands of this court to such effect.

2. That pursuant to the opinion above cited, the privilege of voting for such representative to Congress is not a privilege secured to the plaintiff by Section 2 of Article 1 of the Constitution of the United States, and that, therefore, the said poll tax is not a tax imposed upon any privilege secured to the plaintiff by the Constitution of the United States.

3. That since such privilege is not secured to the plaintiff by the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States has no application.

4. That the said provisions of the Constitution of the State of Tennessee and of the Code of Tennessee are valid and binding on the plaintiff.

5. That the Court expressly declares that the plaintiff is not entitled to vote in the special election for members of Congress to be held on September 13, 1939, in the Third Congressional District of Tennessee with-

out the prepayment of poll tax, he being legally liable therefor in the event of the validity of such statutes of Tennessee as apply to him.

HARRIS & BROWN,
By (s) CRAMPTON HARRIS,
Attorneys for Appellant, Henry Pirtle,
727 Frank Nelson Building,
Birmingham, Alabama.

HERBERT G. B. KING,
By (s) CRAMPTON HARRIS,
Attorney at Chattanooga, Tenn.

ORDER EXTENDING TIME

It appearing to the Court that an appeal in captioned cause has been made from the Judgment of this Court to the Circuit Court of Appeals, Sixth Circuit; and

That on account of numerous pressing matters incident to the session of court in progress, the Clerk has not been able to complete the preparation of the record on appeal so that it may be filed within the period prescribed for such filing of appeal, and therefore requests an extension of twenty days, as is provided by statute.

The Court, fully understanding the premises as recited, is pleased to grant the extension requested.

Enter:

(s) ELMER D. DAVIES,
U. S. District Judge.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA, }
MIDDLE DISTRICT OF TENNESSEE } ss:

I, L. B. Ormes, Clerk of the District Court of the United States in and for the Middle District of Tennessee, do hereby certify that the foregoing pages contain a true, correct and complete record as called for in the praecipe, copy of appeal bond and Designation of Contents of Record on Appeal as the same appears from the records and files in this office.

WITNESS my hand as Clerk and seal of said Court at Nashville, Tennessee, this the 16th day of November, 1939.

(SEAL) L. B. ORMES, *Clerk.*

PROCEEDINGS IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(December 11, 1940—Before: Hicks, Simons and Hamilton, JJ.)

This cause is argued by George S. Brown and Crampton Harris for Appellant and by Nat Tipton for Appellees and is submitted to the court.

DECREE

(Entered March 8, 1941)

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed March 8, 1941)

Before HICKS, SIMONS and HAMILTON, Circuit Judges.

HICKS, Circuit Judge. On September 13, 1939, a special election was held in the Third Congressional District of Tennessee to fill a vacancy in the House of Representatives of the United States. Appellant, Henry Pirtle, possessed all the qualifications required by the laws of Tennessee to entitle him to vote in this election except that he had not paid his poll tax. For this reason the judges of election declined to allow him to vote.

The question is, whether the Constitution and statutes of Tennessee, which make the payment of a poll tax a condition precedent to the right to vote for members of Congress, are repugnant to any provisions of the Constitution of the United States.

From an adverse decree, Pirtle appealed.

Article I, Section 2, of the Constitution of the United States is as follows:

> "The House of Representatives shall be composed of Members chosen every second year by the People of the Several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

It is not to be doubted that the people of a state may through a constitutional convention prescribe the qualification of voters and the limitation of the elective franchise, provided of course that the privileges and immunities of the voters guaranteed to them by some provision of the Federal Constitution are not violated. See *Breedlove* v. *Suttles*, 302 U. S. 277, 283. The Tennessee Constitution was adopted in 1870 and Article IV, Sec. 1, thereof, fixed the qualifications for voters as follows:

> "Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months

> next preceding the day of election, shall be entitled *to vote for members of the General Assembly,* and other civil officers for the county or district in which he resides; and *there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law, without which his vote cannot be received.*" (Italics ours.)

The General Assembly includes, of course, the Senate and the House of Representatives, the latter being the most numerous branch of the Legislature.

Pursuant to this constitutional provision, the Legislature (Sec. 2027 of the Code of Tennessee) enacted the following statute,—

> "Every person in this state, who is otherwise, a qualified voter under the constitution and laws, shall, as a condition precedent to the exercise of voting, furnish to the judges of election satisfactory evidence that he has paid the poll tax, if any, assessed against him for the year next preceding the election, not later than sixty days prior to the day of said election, without which his vote shall not be received."

Article IV, Section 1 of the Tennessee Constitution, above quoted, was adopted by a vote of fifty-six yeas and eighteen nays. The principal objection to it, as indicated by the separate protests (pp. 178 et seq. of the Journal of the Proceedings of the Convention) of Mr. Staley, Mr. Gibson and others, members thereof, was that suffrage was a right and not a privilege that could be taxed. Mr. Gibson referred to it as a right such as the right to life, liberty or property. This is not true. It is a political right which the people of a state may appropriately condition through its fundamental law or legislation in conformity therewith. But none of the protestants in their

vigorous denunciation of the provision, advanced the argument presented here, that the right to vote for a member of Congress stems out of Article I, Section 2, of the Federal Constitution.

A pertinent preliminary inquiry is, whether the state has levied a poll tax upon the exercise of the elective franchise. Article II, Section 28 of the Constitution of Tennessee provides that,—

> "All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Article XI, Section 12 of the Constitution provides:

> "The State tax derived hereafter from polls shall be appropriated to educational purposes in such manner as the General Assembly shall, from time to time, direct by law."

Pursuant to these constitutional provisions, the Legislature passed the following statute:

> "Every inhabitant between the ages of twenty-one and fifty years, except persons who are deaf, dumb, blind or incapable of labor and of earning a livelihood shall pay an annual poll tax of $1.00 for school purposes, which shall be collected by the trustee of the county and retained in the county where collected and apportioned to the schools of said county in the manner prescribed by law. Liability for poll tax and the exemption therefrom is determined and fixed according to the age of the inhabitant on the tenth day of January of each year."

It is clear enough that these provisions do not levy or assess a poll tax upon voters as a class. Voters are nowhere referred to. It is of course true that a large number of voters would be liable for the tax but it is just as true

that a large number, such as those who are deaf, dumb, blind, incapacitated for labor or over fifty years of age, would not. Upon the other hand, a large class of inhabitants ineligible to vote at all, such as aliens, persons convicted of infamous crimes, persons who have not lived in the state and county for the requisite period of time, and all persons who do not choose to vote, are still liable for the tax.

Again, it is worthy of note that the tax is levied by that section of the Tennessee Constitution dealing with taxation, while the disqualification of the voter for failure to pay it, is found in that section dealing with the qualification of voters.

The collection of the poll tax has always been attended with difficulty because the assessment falls upon many poor people but the state has earnestly insisted upon its collection. As an illustration (Sec. 1559 of the Code) the property taxpayer is not permitted to pay his tax without paying his poll tax at the same time and by the same section every tax collector who permits a violation thereof is held liable for all poll taxes which thus become delinquent.

The collection of the poll tax is stressed because when collected it becomes a part of an educational fund which the state, impoverished by war, began to build up, cherish and protect as a governmental policy, imbedded in the Constitution itself (Article XI, Sec. 12).

Upon the whole, we think it is reasonable to conclude that the provisions requiring the payment of the tax as a prerequisite to voting do not so much connote a levy and assessment as they do an effective method of collection. They do not levy a poll tax upon any voter. They give due recognition to the poll tax assessment laws hereinbefore quoted. They do not disturb any voter who is over fifty years of age, or deaf, dumb, blind or incapacitated. They have their foundation in the idea that the normal voter will protect his franchise by paying his poll tax if it has been assessed against him. We think this is at least a permissible construction which we should

adopt if any constitutional objection may thereby be foreclosed.

But in any event, we are not dealing with the question whether the payment of poll tax as a prerequisite to voting violates some natural right or fancied political right. The inquiry is, whether such provision denied any privileges or immunities protected by the Federal Constitution. We have already seen that Article I, Section 2 of the Constitution of the United States guaranteed to the elector for members of Congress no other privileges than those accorded him by the state as an elector for the most numerous branch of the state legislature. But appellant goes beyond this. He urges that the quoted provision of Article IV, Section 1 of the Constitution of Tennessee and Section 2027 of the Code violates the "privileges and immunities" clause of the Fourteenth Amendment; that his right to vote for a member of Congress is not taxable, regardless of whether the amount of the tax imposed is trifling or substantial. We need not labor the point. It has been conclusively decided against appellant in *Breedlove* v. *Suttles,* supra (302 U. S. 283) where the court said:

> "2. To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. *Minor* v. *Happersett,* 21 Wall. 162, 170, et seq. *Ex parte Yarbrough,* 110 U. S. 651, 664-665. *McPherson* v. *Blacker,* 146 U. S. 1, 37-38. *Guinn* v. *United States,* 238 U. S. 347, 362. The privileges and immunities protected are only those that arise from the Constitution and laws of the United States and not those that spring from other sources. *Hamilton* v. *Regents,* 293 U. S. 245, 261."

The decree appealed from is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Henry Pirtle* v. *Henry Brown, et al,* No. 8466, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 15th day of May, A. D., 1941.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

Office - Supreme Court, U. S.
FILED
JUN 2 1941
CHARLES ELMORE CROPLEY
CLERK

(19)

Supreme Court of the United States

October Term, 1940

No. 117

314-621

HENRY PIRTLE,
Petitioner,

vs.

H. B. BROWN, CHRISTIAN KOPP and W. F. WARREN, Individually, and as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the precinct or voting place at the Courthouse in Tracy City, Tennessee, and ROY H. BEELER, as Attorney General and Reporter of the State of Tennessee, in his official capacity,
Respondents.

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CRAMPTON HARRIS,
First National Building,
Birmingham, Alabama.
LEE PRESSMAN,
1106 Connecticut Avenue, N. W.,
Washington, D. C.,
Counsel for Petitioner

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Supreme Court of the United States

October Term, 1940

No. ----------

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Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CRAMPTON HARRIS,
First National Building,
Birmingham, Alabama.
LEE PRESSMAN,
1106 Connecticut Avenue, N. W.,
Washington, D. C.,
Counsel for Petitioner

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

HENRY PIRTLE,
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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

Now comes Henry Pirtle, and petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and in support of said petition respectfully shows the following:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The question in this case is whether the State of Tennessee can make the payment of a poll tax a condition precedent to the right to vote in an election to fill a vacancy in the House of Representatives of the United States Congress.

The facts in the case are not in dispute.

The Governor of Tennessee called a special election for the Third Congressional District of Tennessee on September 13, 1939 to fill a vacancy in the House of Representatives of the United States caused by the death of Hon. Sam D. McReynolds. The election was called for the sole and specific purpose of electing a successor to fill out his unexpired term. No other office of any kind, either local or state, was to be filled by said election.

Henry Pirtle, a resident citizen of Tracy City, Grundy County, Tennessee, possessed all the qualifications required by the laws of Tennessee to entitle him to vote in said special election except one. He had not paid his poll tax.

The Judges of Election at the voting box at Tracy City, Tennessee informed Henry Pirtle that he would not be allowed to cast his vote in this special election. He thereupon filed a bill of complaint (Record pages 1 - 5) asking the court to adjudge that he was entitled to vote in the special election and to adjudge that he was entitled to vote in all subsequent elections, to elect senators from the State of Tennessee and to elect representatives to the Congress of the United States from the State of Tennessee so long as he fulfilled the requirements of residence prescribed by the Constitution of Tennessee, regardless of whether or not he should have paid any poll taxes assessed against him. He also asked for an injunction to prevent the Judges of election from prohibiting, molesting, interfering with or preventing him from voting in said election and from directing or advising in any manner any clerk or election official to deny him the right to cast his vote or to refuse to receive his vote in said election.

The Judges of election accepted service of the complaint and agreed to an immediate hearing thereon. Thereafter,

the Hon. Roy H. Beeler, Attorney General of the State of Tennessee, intervened in his official capacity and the Judges of election took no further part in the case. The Attorney General prayed that the Pirtle petition be dismissed and that he be decreed to be entitled to no declaratory relief at the hands of the court.

The court rendered a declaratory judgment and a decree was rendered which adjudged among other things the following:

> 1. That the plaintiff, Henry Pirtle, is a resident of Grundy County, Tennessee, and a citizen of the State of Tennessee and of the United States and that he is more than 21 years of age and possesses all the qualifications necessary to constitute him a legal voter for members of Congress and members of the most numerous branch of the General Assembly of Tennessee, except that the said Henry Pirtle, although liable for poll tax under the statutes of Tennessee, has not paid the same more than sixty days prior to September 13, 1939. (Record 17)
>
> 5. The Court expressly declares that the plaintiff is not entitled to vote in the special election for members of Congress to be held on September 13, 1939, in the Third Congressional District of Tennessee without the prepayment of poll tax, he being legally liable therefor in the event of the validity of such statutes of Tennessee as apply to him. (Record 19)

The opinion of the District Court appears never to have been officially reported. It is found on pages 13 - 16 of the record.

Henry Pirtle took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit and that Court, on March 8, 1941, affirmed the decree of the District Court

and rendered an opinion which is found on pages 28 - 32 of the record, and is reported in 118 Fed. (2nd) 218.

B.

STATEMENT AS TO JURISDICTION

Jurisdiction is founded on the existence of a federal question. The action and right arise under the Constitution and Laws of the United States and particularly under Article I, Section 2 and the Fourteenth Amendment to the Constitution. The original jurisdiction of the district court is conferred by 28 U.S.C.A. section 41, sub-paragraphs 11 and 14 (Judicial Code, section 24, amended) and by 28 U.S.C.A. section 400 (Judicial Code section 274 d). The jurisdiction of this court is conferred by 28 U.S.C.A. section 347 (Judicial Code section 240, as amended).

THE QUESTION PRESENTED

The sole question presented is whether the Constitution and laws of the State of Tennessee, which make payment of a poll tax a condition precedent to the right to vote in an election to fill a vacancy in the House of Representatives of the United States Congress, contravene the provisions, express or implied, of the Constitution of the United States.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals for the Sixth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this court in that it holds that the privilege of voting for members of Congress is not derived from the Federal Constitution.

2. The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal law which has not been, but should be settled by this court, in that it has decided that a State may constitutionally impose a tax upon the right of a citizen of the United States of vote for a member of Congress.

3. The Circuit Court of Appeals for the Sixth Circuit has erroneously decided that the Constitution and statutes of Tennessee, which make the payment of a poll tax a condition precedent to the right to vote for members of Congress are not repugnant to any provisions of the Constitution of the United States.

4. The Circuit Court of Appeals for the Sixth Circuit has erroneously decided that payment of a poll tax as a condition precedent to the right to vote in a Federal election is not a tax on a Federal right.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court for the Sixth Circuit, commanding that court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled, Number 8466, Henry Pirtle, Appellant vs. H. B. Brown, et al, Appellees, and that the judgment of the said court may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HENRY PIRTLE

By:.....

.....

Counsel for Petitioner.

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EF

Supreme Court of the United States

OCTOBER TERM, 1940

HENRY PIRTLE,
Petitioner

vs.

H. B. BROWN, CHRISTIAN KOPP and W. F. WARREN, Individually, and as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the precinct or voting place at the Courthouse in Tracy City, Tennessee, and ROY H. BEELER, as Attorney General and Reporter of the State of Tennessee, in his official capacity.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Middle District of Tennessee (Winchester Division) has not been, so far as we have been able to find, officially reported. It is found in the record, pages 13 to 16, both inclusive. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is found in 118 Fed (2nd) page 218, and was rendered on March 8, 1941. It appears on pages 27 to 32 of the record.

II

JURISDICTION

1. The Constitutional provisions involved are Article I, section 2 of the United States Constitution and the Fourteenth Amendment to the Constitution.

2. The Federal statutes giving original jurisdiction to the District courts are 28 U.S.C.A. section 41, sub-paragraphs 11 and 14 (Judicial Code section 24, amended), and 28 U.S.C.A. section 400 (Judicial Code section 274 d).

The jurisdiction of this Court is conferred by 28 U.S.C.A. section 247 (Judicial Code section 240, amended).

III

STATEMENT OF THE CASE

We refer the Court to the statement of the case given in the petition. The facts are so simple as not to require elaboration nor to justify repetition.

IV

ERRORS ASSIGNED

1. The United States Circuit Court of Appeals for the Sixth Circuit was in error in affirming the decree of the District Court of the United States for the Middle District of Tennessee.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the privilege of voting for members of Congress is not derived from the Federal Constitution.

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that a State may constitutionally impose a tax upon the right of a citizen of the United States to vote for a member of Congress.

4. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the Constitution and statutes of Tennessee, which make the payment of a poll tax a condition precedent to the right to vote for members of Congress are not repugnant to any provisions of the Constitution of the United States.

5. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that payment of a poll tax as a condition precedent to the right to vote in a Federal election is not a tax on a Federal right.

BRIEF OF THE ARGUMENT

POINTS OF LAW

Point of Law No. I. The right to vote for members of Congress is a right arising from and fundamentally based on Article I, Section II of the Constitution of the United States.

U.S. v. Classic, et al. In Ms.—decided May 26, 1941
Article I, Section II, Constitution of the United States;
Ex Parte Yarbrough, 110 U.S. 651, 662;
In re. Quarles v. Butler, 158 U.S. 532;
Wiley v. Sinkler, 179 U.S. 58, 62;
Swafford v. Templeton, 185 U.S. 487;
Pope v. Williams, 193 U.S. 621;
Twining v. New Jersey, 211 U.S. 78.

Point of Law No. II. Rights and privileges arising out of the Constitution of the United States are not subject to State taxation in any form.

McCulloch v. Maryland, 4 Wheaton 314;
California v. Pacific Railroad Co., 127 U.S. 1, 41;
McCallen Co. v. Massachusetts, 279 U.S. 620, 628;
Indian Motorcycle Co. v. United States, 283 U.S. 570 at 575;
Trinityfarm Co. v. Grosjean, 291 U.S. 466 at 471.

Point of Law No. III. The Fourteenth Amendment to the Constitution of the United States, in prohibiting any State from making or enforcing any law abridging the privileges and immunities of citizens of the United States, renders invalid and unconstitutional the imposition by the State of Tennessee of a poll tax as a prerequisite to the right to vote for members of Congress.

14th Amendment to Constitution of United States;
Hague v. C.I.O., 307 U.S. 406;
Thornhill v. Alabama, 310 U. S. 88;
Carlson v. California, 310 U.S. 106;
In re. Quarles v. Butler, 158 U.S. 532;
McCallen Co. v. Massachusetts, 279 U.S. 620, 629;
Twining v. New Jersey, 211 U.S. 78.

Point of Law No. IV. Section I of Article IV of the Constitution of the State of Tennessee and Section 2027 of the Code of Tennessee of 1932 do contravene the provisions, either express or implied, of the Constitution of the United States in requiring the payment of a poll tax as a condition precedent to voting for a Representative to Congress.

Article IV, Section I, Constitution of Tennessee;
Section 2027 Michie's Code of Tennessee, 1932;
Ratliff v. Beale, 20 So. 865 at 868.

ARGUMENT

The fundamental axioms from which we proceed are, first, that the United States Constitution is the supreme law of the land, and second that the sovereignty of the Federal Government within its constitutional sphere is supreme and beyond the encroachment of any state. Our basic theorem is that the right to vote for a member of Congress is a right arising from the Constitution of the United States. This basic theorem does not square with the expression of Mr. Justice Butler in the Breedlove case, 302 U.S. 277 at 283. In that case we find this statement:

> "Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. Minor v. Happersett, 21 Wall. 162, 170 et seq. Ex parte Yarbrough, 110 U.S. 651, 664-665. McPherson v. Blacker, 146 U.S. 1, 37-38. Guinn v. United States, 283 U.S. 347, 362."

The Yarbrough case, to which the learned Justice refers as an authority in support of his statement, is in fact, an authority directly to the contrary. It distinguishes also the case of *Minor* v. *Happersett.*

The language of the learned Justice is neither supported by the decisions of the Supreme Court nor by fundamental principles of Constitutional law. He was evidently speaking with the Fourteenth Amendment uppermost in his mind and without giving due consideration to Article I, Section II of the Constitution.

The basic theorem which we urged upon the courts below has only this week been established by this court in

the Classic case — in Ms. May 26, 1941. That opinion makes unnecessary a repetition of the arguments we used. The applicable language of the majority opinion is here set out for the convenience of the court.

> "We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough*, 110 U.S. 651; *United States v. Mosley*, 238 U.S. 383. And see *Hague v. C.I.O.*, 307 U.S. 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase 'rights secured by the Constitution' appearing in Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the States, see, *Minor v. Happersett*, 21 Wall. 162, 170; *United States v. Reese*, 92 U.S. 214, 217-218; *McPherson v. Blacker*, 146 U.S. 1, 38-39; *Breedlove v. Suttles*, 302 U.S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Section 2 of Article I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Section 4 and its more general power under Article I, Section 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying

into execution the foregoing powers'. See *Ex parte Siebold,* 100 U.S. 37; *Ex parte Yarbrough, supra,* 663, 664; *Swafford v. Templeton,* 185 U.S. 487: *Wiley v. Sinkler,* 179 U.S. 58, 64.

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough, supra; Wiley v. Sinkler, supra; Swafford v. Templeton, supra; United States v. Mosley, supra;* see *Ex parte Siebold, supra; In re Coy,* 127 U.S. 731; *Logan v. United States,* 144 U.S. 263. And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough, supra; Logan v. United States,* supra. * * * *

"That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our Constitutional scheme of government cannot be doubted."

The pertinent portions of the older decisions on which we relied are to be found at the following pages: *Swafford v. Templeton,* 185 U.S. at 491, (White, J.); *Ex parte Yarbrough,* 110 U.S. at 661 to 664, (Miller, J.); *In re Quarles v. Butler,* 158 U.S. at 535, (Gray, J.); *Wiley v. Sinkler,* 179 U.S. at 62, (Gray, J.); *Pope v. Williams,* 193 U.S. at 633, (Peckham, J.); *Twining v. State of New Jersey,* 211 U.S. at 97, (Peckham, J.).

As we read the dissenting opinion in the Classic case the three justices who dissented did not deny the correctness of our basic theorem.

The right to vote for State officers is primarily derived from the States. As to members of Congress it is derived from the Constitution. The petition in the Breedlove case asked for a writ of mandamus to allow the petitioner to register for voting for Federal and State officers at primary and general elections, without payment of poll taxes. While Mr. Justice Butler did not differentiate between the two classes, yet it seems clear that the presence of the State class must have diverted his attention from the principles applicable to the Federal class. It does not appear from the opinion that Article I, Section II was called to the attention of the learned Justice. It is nowhere mentioned in the report of the case.

RIGHTS AND PRIVILEGES ARISING OUT OF THE CONSTITUTION OF THE UNITED STATES ARE NOT SUBJECT TO STATE TAXATION IN ANY FORM.

The doctrine of immunity from taxation by a State finds its origin in the celebrated decision of Chief Justice Marshall in the case of *McCulloch v. Maryland,* 4 Wheat, 314. It is founded upon the essential nature of sovereignty. That nature has not been changed by any decision of the Supreme Court.

A good expression of the doctrine laid down in *McCulloch v. Maryland,* is found in *California v. Pacific Railroad Company,* 127 U. S. 1 at page 41 as follows:

> "Recollecting the fundamental principle that the Constitution, laws and treaties of the United

States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive to the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court is McCulloch v. Maryland, 4 Wheat. 314; Osborne v. The Bank of the United States, 9 Wheat. 739; and Brown v. Maryland, 12 Wheat 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed."

Another expression along the same line is found in *McCallen Co. v. Massachusetts,* 279 U.S. 620 at page 628:

"The aphorism of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 431, that 'the power to tax involves the power to destroy,' has frequently been reiterated by this Court. The principle, of course, is important only where the tax is sought to be imposed upon non-taxable subject, or, as said in Knowlton v. Moore, 178 U.S. 41, 60, '* * * the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope.' Not only may the power to tax be exercised too oppressively, but for one government—state or national—to lay a tax upon the instrumentalities or securities of the other is derogatory

to the latter's dignity, subversive of its powers, and repugnant to its paramount authority. See California v. Pacific Railroad Co., 127 U.S. 1, 41."

The privilege of voting and the exercise of that function are most intimately connected with the vital functions of Government. The elective franchise furnishes the means by which members of Congress are chosen. The selection of the individuals to perform the legislative function is necessarily Governmental. It is an essential element of sovereignty.

The franchise is conferred on the individual, not for his benefit but for the benefit of the Federal Government and for the purpose of maintaining the established Constitutional system.

If the states have the power to tax this franchise they have the power to destroy representative government. If they have the power to tax they have the power to say what the tax shall be. They can, therefore, levy a poll tax so high that rich men only will be able to vote.

It is no answer to say that no state has carried the power to such an extreme. It is the existence of the power which conflicts with the Constitution and not merely the possible abuse of that power.

The true doctrine is stated very clearly in the opinion of Mr. Justice Van Devanter in the case of *Indian Motorcycle Co. v. United States,* 283 U.S. 570 at 575:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that

the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. *Collector v. Day*, 11 Wall. 113, 125, 127; *Willcuts v. Bunn*, 282 U.S. 216, 224-225. *Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. McCulloch v. Maryland*, 4 Wheat. 316, 430 ; *United States v. Baltimore & Ohio R. Co.*, 17 Wall. 322, 327; *Johnson v. Maryland*, 254 U.S. 51, 55-56; *Gillespie v. Oklahoma*, 257 U.S. 501, 505; *Crandall v. Nevada*, 6 Wall. 35, 44-46." (Emphasis supplied).

Mr. Justice Butler examines the doctrine of immunity from taxation in Trinityfarm Co. v. Grosjean, 291 U.S. 466 at 471.

> *"Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. Indian Motorcycle Co. v. United States*, 283 U.S. 570, 575, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them." (Emphasis supplied).

The elective franchise is not an article of commerce. It cannot be sold by the individual and should never be sold by the State to the individual. To allow the State to tax it is to allow the State to sell it. As sole purveyor of an

object nowhere else obtainable it can fix its own price. What an anomaly! The citizen derives his right to vote for members of Congress from the Federal Government, it is his by grant, and yet he must ransom it from the state. In Tennessee he must deliver the cash for it. A man may work out the road tax, but there is no provision, so far as we can find, whereby the diligent citizen can give of his strength and energy in payment of his right to vote.

It is not an answer to the prohibition against taxation to say that "the electors in each State shall have the qualifications requisite for Electors of the most numerous branch of the State Legislature."

If "qualifications" means those things which fit a man to take part in his government then the payment of a tax is not included. Whether or not a citizen has paid money is no test of his fitness to participate in the selection of Members of Congress. The requirement that a voter be 21 years of age is a test of fitness. At that age one is supposed to have reached a man's estate and to have acquired some maturity of judgment. The requirement that he be a resident for a specified period is a test of fitness. Residence gives familiarity with local problems, conditions and candidates.

If payment of a tax is a qualification we confront the peculiar situation that a corrupt candidate can confer qualification upon thousands of citizens by paying their poll tax. The very thing which should disqualify the citizen as a voter actually qualifies him. It would be a curious line of reasoning to hold that something done by a third person becomes a "qualification" of or in the voter. How can his fitness to share in the responsibilities of the elec-

tive franchise be determined by something external to himself? Was it ever contemplated that individuals should be able to dispense qualifications, confer the right of suffrage and usurp a function of sovereignty?

We submit that the word "qualifications" in Article I, Section 2 was never intended to include a tax and should not be extended by construction to include a tax. Such an extension runs counter to the doctrine of Federal Supremacy.

A grant of power to fix qualifications does not confer the power to levy an unconstitutional tax. No grant of power in the Constitution is to be considered by itself alone. Each must be considered as a part of a vast unified plan. An apparent grant may be limited by an implied prohibition. No grant should be construed in such way as to destroy the organic function of the whole.

THE FOURTEENTH AMENDMENT

The Fourteenth Amendment to the Constitution of the United States reads in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Mr. Justice Butler in the Breedlove case, page 283 seems to assume that if the right to vote were a right arising from the Constitution of the United States it would be protected by the privileges and immunities clause of the Fourteenth Amendment. This court has protected against state action the exercise by individuals of rights guaranteed them by the Constitution. See *Hague v. C.I.O.*,

307 U.S. 406; *Thornhill v. Alabama,* 310 U.S. 88; *Carlson v. California,* 310 U.S. 106. The cases to which we have already directed the attention of the court clearly demonstrate that the right to vote for a Member of Congress does arise from the Constitution of the United States.

There is another statement by the same learned Justice in the Breedlove case to which attention should be directed. He says:

> "Payment as a prerequisite is not required for the purpose of denying or abridging the privilege of voting."

It does not appear where the learned Justice got his information as to the purpose of the legislation. In fact, we believe the purpose of levying this unconstitutional tax was to make an unjustifiable abridgement of the privilege of voting. The State of Mississippi has a poll tax as a prerequisite to the right to vote and the highest court of that state has expressly held that a contrary purpose actuated the legislature. In the opinion of *Ratliff v. Beale,* 20 Sou, 868, 869, the Supreme Court of Mississippi say:

> "In the article of franchise is found the section we have under consideration. True, as argued by counsel, it was a revenue measure, for it imposes a tax. But it is also true that the payment of the tax is one of the qualifications of an elector, and the question is whether its primary purpose is for revenue, with incidental disqualification to vote attached upon its non-payment, or whether the tax was levied primarily as an additional disqualification to those who should not pay it, with the incident of revenue derivable from those who should pay. * * * (Page 869) In our opinion, the clause was primarily intended

by the framers of the Constitution as a clog upon the franchise, and secondarily and incidentally only as a means of revenue."

If the Supreme Court of Mississippi is correct then the State of Tennessee no doubt provided for a poll tax not merely to raise revenue but to abridge a Federal franchise. An examination of the Tennessee statute and Constitution shows a concentrated attention on the poll tax. Section 2027 of the Code provides that:

> "Every person in this State, who is otherwise, a qualified voter under the constitution and laws, shall, as a condition precedent to the exercise of voting, furnish to the judges of election satisfactory evidence that he has paid the poll tax, if any, assessed against him for the year next preceding the election, not later than sixty days prior to the day of said election, without which his vote shall not be received."

The Constitution provides in Article IV, section 1, that:

> "There shall be no qualification attached to the right of suffrage, except that each voter shall give to the Judges of election, where he offers to vote, satisfactory evidence that he has paid the poll taxes, etc."

It would be a strange perversion of Article I, section 2 of the Constitution of the United States to say that under it a State could make the payment of a tax the only qualification for voting.

THE OPINION BELOW

We submit that the Breedlove case does not accurately interpret previous decisions. Neither did the Court of Appeals accurately interpret the decision in the Breedlove case. In the last complete paragraph of the opinion the Court of appeals say that the decision in the Breedlove case is a conclusive decision against petitioner's contention "that his right to vote for a member of Congress is not taxable, regardless of whether the amount of the tax imposed is trifling or substantial." We do not so understand the Breedlove case. That decision held that the right to vote for a member of Congress was not derived from the Constitution and was therefore not protected by the Fourteenth Amendment. It did not hold that a state may tax a federal right.

The appellant in the Breedlove case argued his appeal upon the theory of class discrimination. He also argued that the tax was unreasonably imposed. That is not our approach. We say that a tax upon the right to vote for a member of Congress is a violation of the U. S. Constitution regardless of reasonableness. It is not a question of degree but a question of power.

At page 30 of the record the opinion of the court below contains this statement: "It is clear enough that these provisions do not levy or assess a poll tax upon voters as a class. Voters are nowhere referred to." The learned Judge below also stated, "It is worthy of note that the tax is levied by that section of the Tennessee Constitution dealing with taxation, while the disqualification of the voter for failure to pay it is found in that section dealing with the qualification of voters." The classification of

the draftsman may shed some light upon his intention, either to classify or to conceal but the effect of the law is not thereby changed. The effect of the Tennessee system is to deprive a voter of his right to vote unless he pays a tax. If the impact of a law results in the destruction of a Federal right, neither silence nor any form of words should hide from the court the actual result achieved. Cleverness in wording or in classification or in keeping silent can not avail to circumvent the Constitution. The protection afforded by that instrument is not limited merely to direct attack but extends to all forms of cunning contrivances.

The Tennessee Constitution, Article 11, section 12, provides that "the State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the general assembly shall, from time to time, direct by law." The opinion of the court below seems to attach some importance to this fact. The use to which the tax was put no doubt served to restrain many citizens from assailing the tax. They would hesitate to be put in the position of being opposed to education. But we cannot see where the subsequent use of the proceeds of an unconstitutional tax can be used as a valid argument for its constitutionality. If such an argument could prevail charitable motives and benevolent uses would indeed cover a multitude of unconstitutional taxes.

CONCLUSION

It is not necessary to decide whether or not the payment of the poll tax as a condition precedent to the right to vote was levied from good motives or from bad motives. There is no question of degree involved in this case. The tax is either constitutional or unconstitutional. It must stand or fall as it exists without speculation as to whether it is a reasonable tax or not. The Constitution does not say that a State can levy a reasonable tax on a Federal franchise any more than it says a reasonable tax can be laid by a state on interstate commerce or the mails. It does not say that a State can reasonably abridge the rights and privileges of a citizen of the United States. It says a State cannot abridge them at all.

We respectfully submit that the Constitution of the United States and the decisions of the Supreme Court entitle this petitioner to a writ of certiorari and the ultimate reversal of the courts below.

Respectfully submitted,

CRAMPTON HARRIS

LEE PRESSMAN

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APPENDIX

Article I, Section IV of the Constitution of the State of Tennessee provides that:

> "Section I: Every male person of the age of twenty-one years being a citizen of the United States and a resident of the State for twelve months, and of the County wherein he may offer his vote for six months next preceeding the day of the election, shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage except that each voter shall give to the judges of election where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law without which his vote cannot be received. And all male citizens of the State shall be subject to the payment of poll taxes and the performance of military duty within such ages as may be prescribed by law."

Section 2027 of the Code of Tennessee provides as follows:

> "Every person in this state, who is otherwise a qualified voter under the constitution and laws, shall, as a condition precedent to the exercise of voting, furnish to the judges of election satisfactory evidence that he has paid the poll tax, if any, assessed against him for the year next preceding the election, not later than sixty days prior to the day of said election, without which his vote shall not be received."

Section 1082 of the Code of Tennessee of 1932 as amended by Public Acts of Tennessee, 1933 c 149, reads as follows:

> "Every inhabitant between the ages of twenty-one and fifty years, except persons who are deaf, dumb, blind or incapable of labor and of earning a livelihood, shall pay an annual poll tax of one dollar for School purposes, which shall be collected by the Trustee of the County and retained in the County where collected and apportioned to the Schools of said County in the manner prescribed by law. Liability for poll tax and the exemption therefrom is determined and fixed according to the age of the inhabitant, on the tenth day of January of each year."

Article I, Section II of the Constitution of the United States reads as follows:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.
>
> "When vacancies happen in the representation from any state the Executive Authority thereof shall issue writs of Election to fill such vacancies."

Title 28 U.S.C.A. Sec. 41, sub-paragraph 11 and 14 (Judicial Code Section 24, amended). The district courts shall have original jurisdiction as follows:

(11) *Suits for injuries on account of acts done under laws of United States.* Eleventh. Of all suits brought by

any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or cellection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

(14) *Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Title 28 U.S.C.A. Sec. 400 (Judicial Code Section 274d).

(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

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CLERK

Supreme Court of the United States

October Term, 1940.

No. 117

HENRY PIRTLE,
Petitioner,

vs.

H. B. BROWN, CHRISTIAN KOPP, and W. F. WARREN, individually, and as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the precinct or voting place at the Courthouse in Tracy City, Tennessee, and ROY H. BEELER, as Attorney General and Reporter of the State of Tennessee, in his official capacity,

Respondents.

REPLY OF ROY H. BEELER, ATTORNEY GENERAL AND REPORTER OF THE STATE OF TENNESSEE, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Supreme Court of the United States

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H. B. BROWN, CHRISTIAN KOPP, and W. F. WARREN, individually, and as Judges of Election for the Fifth Civil District of Grundy County, Tennessee, for the precinct or voting place at the Courthouse in Tracy City, Tennessee, and ROY H. BEELER, as Attorney General and Reporter of the State of Tennessee, in his official capacity,

Respondents.

REPLY OF ROY H. BEELER, ATTORNEY GENERAL AND REPORTER OF THE STATE OF TENNESSEE, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

May It Please the Court:

STATEMENT OF THE CASE.

This suit originated in the District Court of the United States for the Middles District of Tennessee by the filing of a petition by the petitioner, Henry Pirtle, under the Federal Declaratory Judgments statutes, against three individuals named as Judges of Election in a special election

held to fill a vacancy occasioned by the death of a member of the House of Representatives. The petition averred that the petitioner possessed all qualifications required by state law to vote in such election save that he had not paid his poll tax for the preceding year as required by the Constitution and statutes of Tennessee, and further averred that since the election was to be held solely for the purpose of filling a vacancy in the House of Representatives, the constitutional provisions and statutes of Tennessee thereby had the effect of levying a tax upon the exercise of a Federal right by the petitioner and for this reason were invalid and that the petitioner was entitled to vote in such election despite the non-payment of such poll tax for the preceding year. The petition prayed for a declaration at the hands of the Court to the effect that such statutes were invalid and that the petitioner was entitled to vote in such election despite his non-payment of such tax.

The individuals named as Judges of Election being only nominal parties without real interest in the controversy, the Attorney General and Reporter of the State of Tennessee, in his official capacity, was permitted to intervene and file pleadings, maintaining the validity of such statutes against the contentions presented by the petitioner.

Upon the hearing in the District Court, it was adjudged that the petitioner was not entitled to the relief sought by his petition and a declaration to that effect was entered. An appeal was duly prayed, granted and perfected to the United States Circuit Court of Appeals for the Sixth Circuit, which Court affirmed the decree of the lower court on March 8, 1941. The opinion of the Circuit Court of Appeals is reported in 118 Fed. (2d), 218, and is found on pages 28-32 inclusive of the transcript of the record.

QUESTION.

The question presented by the petition for certiorari is whether or not the constitutional provisions and statutes of Tennessee levying a non-discriminatory poll tax, not to exceed $2.00 annually, upon all *inhabitants* between the ages of 21 and 50 years, and making its prepayment a condition precedent to voting in *any* election, violates the Constitution of the United States when applied to an election held for the purpose of electing a member of the House of Representatives.

Stated differently, the present case concerns, not the constitutional right of the qualified elector to cast his vote for federal officers, but the right of the state to prescribe qualifications for voters for the most numerous branch of its own legislature which automatically become the qualifications of one desiring to vote for members of the House of Representatives.

JURISDICTION.

Jurisdiction of the Federal Courts is conceded by this respondent.

POINTS OF LAW.

1.

Since the federal question sought to be made by petitioner has been decided adversely to his contention by two decisions of this Court, the petition should be denied as presenting no substantial federal question.

Breedlove v. *Suttles*, 302 U. S., 271;
Pope v. *Williams*, 193 U. S., 632.

II.

Where a statute be susceptible of two constructions, that construction should be placed on it which avoids doubt as to the constitutionality of such statute.

Bratton v. *Chandler*, 260 U. S., 110, 114;
U. S. v. *Jin Fuey Moy*, 241 U. S., 394, 401.

III.

The poll tax in Tennessee is a revenue measure with incidental disqualification for failure to pay, rather than a tax on the privilege of voting.

Const. of Tenn. (1870), Art. II, Sec. 28;
Const. of Tenn. (1870), Art. IV, Sec. 1;
Const. of Tenn. (1870), Art. XI, Sec. 12;
Code of Tenn. (1932), Sec. 1082;
Code of Tenn. (1932), Sec. 1083;
Code of Tenn. (1932), Sec. 1559;
Code of Tenn. (1932), Sec. 2027;
Code of Tenn. (1932), Sec. 2030;
Breedlove v. *Suttles*, 302 U. S., 277;
Whittaker v. *Watson*, 68 Ark., 555; 60 S. W., 651;
Opinion of Justices, 11 Pick. (Mass.), 538.

IV.

The right to universal suffrage is not conferred by the Constitution of the United States or any amendment thereto.

Breedlove v. *Suttles*, 302 U. S., 277;
Guinn v. *U. S.*, 238 U. S., 362;
Minor v. *Happersett*, 21 Wall., 162.

V.

On the contrary, Article I, section 2, of the Constitution of the United States reserves to the several states the right to determine who shall constitute the electors of the most numerous branch of the state legislature and then such qualifications are adopted by the Constitution of the United Stated as those of the electors for members of the House of Representatives.

Breedlove v. *Suttles*, 302 U. S., 277;
Ex Parte Yarbrough, 110 U. S., 651.

VI.

While the right to vote for members of the House of Representatives is a right having its origin in the Constitution of the United States, such right must be exercised in conformity with the state laws both as to qualifications and as to method of voting in the absence of congressional legislation upon the subject.

U. S. v. *Classic, et al*, 313 U. S., ..., Opinion May 26, 1941.

VII.

A property qualification or the prepayment of poll tax as a condition precedent to the exercise of the elective franchise does not violate the Constitution of the United States.

Breedlove v. *Suttles*, 302 U. S., 277;
Myers v. *Anderson*, 238 U. S., 368;
Pope v. *Williams*, 193 U. S., 632;
U. S. v. *Reese*, 92 U. S., 214;
Minor v. *Happersett*, 21 Wall., 162;
Frieszleben v. *Shallcross*, 9 Houston (Del.), 1;

State, ex rel. v. *Dillon,* 32 Fla., 545;
McMahon v. *Savannah,* 66 Ga., 217;
Buckner v *Gordon,* 81 Ky., 665;
Patterson v. *Barlow,* 60 Pa. St., 54.

VIII.

Indirect taxation of federal rights or federal instrumentalities by a non-discriminatory tax does not conflict with the Constitution of the United States.

Tradesmen National Bank v. *Okla. Tax. Com.,* 309 U. S., 560;
Graves v. *N. Y.,* 306 U. S., 465;
James v. *Dravo Const. Co.,* 302 U. S., 134;
Fox Film Co. v. *Doyal,* 286 U. S., 123;
Pacific Co. v. *Johnson,* 285 U. S., 480;
Educational Film Co. v. *Ward,* 282 U. S., 379.

ARGUMENT.

I.

THE GROUNDS RELIED UPON AS JUSTIFYING THE GRANTING OF THE PETITION HAVE BEEN DECIDED ADVERSELY TO THE CONTENTION OF THE PETITIONER.

The petition gives as the reasons relied upon for the allowance of the writ four grounds, all of which go to the same point, to-wit, that no state may constitutionally impose as a condition precedent to the casting of a vote for a member of Congress the prepayment of a poll tax. This exact question was decided against the contention of the petitioner in the case of *Breedlove* v. *Suttles*, 302 U. S., 277, 82 L. Ed., 252. It is argued upon behalf of the petitioner that the Court in determining the case of *Breedlove* v. *Suttles, supra.*, was misled by the fact that state officials were to be voted for at the same election and that this constituted the determining factor in the decision of the Court. Such contention proceeds from a misconception of the opinion. As stated in the opinion, under the Georgia statutes, payment of a poll tax was a condition precedent to entitle any person to register and vote at any election, Federal or state. Thusly, the question of the right to vote in Federal elections was directly involved in this case. That this is true appears from the annotation following this case in 82 L. Ed, 257, 258. Likewise, from such annotation it distinctly appears that the appellant urged the Court to reconsider the constitutional power to condition the right to vote upon the payment of a tax.

In *Pope* v. *Williams*, 193 U. S., 621, 632-633, in determining that the qualifications which might be imposed by

a state lay within the discretion of that state except so far as such might be restrained by the provisions of the Federal Constitution, this Court said:

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall., 162. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. *In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.* The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor* v. *Happersett, supra,* such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. *A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the states alone to prescribe,* subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Federal Constitution,

Art. 1, sec. 2; *Wiley* v. *Sinkler*, 179 U. S., 58. *But the elector must be one entitled to vote under the state statute.* (Id., Id.) See also *Swafford* v. *Templeton*, 185 U. S., 487, 491. In this case no question arises as to the right to vote for electors of President and Vice President and no decision is made thereon. *The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one.*" (Italics ours)

We respectfully insist that these two opinions of this Court definitely foreclose against the petitioner the alleged conflict of the challenged statutes with the Federal Constitution, and for that reason, the Federal question sought to be presented by him is without substance and the petition should be denied.

II.

STATUTES SHOULD BE CONSTRUED SO AS TO AVOID DOUBTS AS TO THEIR CONSTITUTIONALITY.

We take it that the foregoing rule of statutory construction is perhaps as universal as any rule of law prevailing in the United States. It is so universal that this respondent respectfully insists that merely a reference to the two cases above set forth as sustaining such proposition will suffice to establish it. These cases are *Bratton* v. *Chandler*, 260 U. S., 110, 114; and *U. S.* v. *Jin Fuey Moy*, 241 U. S., 294, 401. Numerous other cases might be cited to the same effect.

III.

THE POLL TAX LEVIED BY THE STATE OF TENNESSEE IS A REVENUE MEASURE WITH INCIDENTAL DISQUALIFICATION FOR FAILURE TO PAY, RATHER THAN A TAX ON THE PRIVILEGE OF VOTING.

In considering this question obviously, the nature of such poll tax must be investigated. In Tennessee poll taxes were authorized by the Constitution of 1834 (Article II, Sec. 28). At that time prepayment was not a condition precedent to voting. Pursuant to this grant of power, polls were levied at the rate of 25c (Code of 1858, Sec. 553).

The Constitution of 1870 made a rather decided change in the levy of poll taxes in Tennessee. By Article II, Sec. 28, Constitution of 1870, it was provided:

> "All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Likewise, Article IV, Sec. 1, of this same document made for the first time prepayment a condition precedent to the exercise of the electoral franchise in the following language:

> "Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county where-

in he may offer his vote for six months next preceding the day of election ,shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of the election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe and at such time as may be prescribed by law, without which his vote can not be received."

Likewise, Article XI, Sec. 12 of this Constitution irrevocably dedicated the State revenues received from poll taxes to educational purposes.

Pursuant to this grant of power, the Legislature (Code of Tennessee 1932, Sec. 1082), levied a poll tax on behalf of the State in the sum of $1.00 against all persons between the ages of 21 and 50 years of age, the age of such person as of January 10 constituting the test of liability. By the following section of the Code (1083), the several county courts of the State were authorized to exempt persons physically unable to labor from the payment of this tax.

By Section 2027 of the Code payment of poll tax for the preceding year was required to be made sixty days prior to the date on which any election shall be held to enable the person so paying such poll tax to vote therein. By Section 2030 of the Code, it is provided that a duly authenticated list of all persons paying their poll tax more than sixty days prior to the date of any regular election shall be made by the County Trustee (the collecting officer) and

that one copy thereof shall be furnished to the Chairman of the Board of Election Commissioners (who conduct elections) and another to the Secretary of State.

As showing the solicitude with which the Legislature viewed efforts to collect this poll tax, the statute (Code Section 1559) forbids any tax collecting officers to receive the property taxes of any person liable for poll tax unless such poll tax is paid at the same time such property taxes are paid.

As the Court has no doubt already discovered, the argument on behalf of the appellant is to the effect that the poll tax is a tax upon the privilege of exercising the electoral franchise and that since the right to vote for members of Congress and electors for President and Vice-President is conferred by the Federal Constitution, such constitutes an effort on the part of the states to tax a Federal privilege or right and, therefore, can not be sustained.

Obviously, if the tax in question is not a tax upon the right to vote, but on the contrary, merely a revenue measure, the argument falls flat and we shall undertake to demonstrate that it constitutes a revenue measure rather than a tax upon the exercise of the electoral franchise.

The following points seem to the respondent to require the construction contended for by us in construing this statute:

(1) Neither the Tennessee constitutional provision nor the statutes enacted pursuant thereto purport by their terms to levy a tax either upon the privilege of voting or upon the voters as a class.

(2) A contrary intent may be inferred from the exclusion of a vast body of qualified voters from liability for this tax.

(3) The party against whom this tax is properly levied remains liable for the payment thereof whether or not such party exercises the electoral franchise.

(4) Aliens, persons deprived of citizenship by reason of conviction of infamous crimes, persons who may not be qualified to vote from lack of residential qualifications. and others who do not possess the right to vote are liable for such tax.

(5) No additional payment of tax is required for the exercise of the privilege of voting for members of the House of Representatives.

(6) The constitutional provisions levying this tax are found in that portion of the Constitution of Tennessee dealing with taxation, while the disqualification provisions are found in that section of the Constitution dealing with elections. The same is true of the Tennessee statutes.

Briefly discussing the foregoing points, it is obvious from a reading of the Tennessee statutes that they do not by express terms undertake to levy a tax upon either the privilege of voting or upon voters as a class for the statute in question levies a tax upon all *inhabitants* between specified ages. The use of the word "inhabitants" is significant and denotes an effort to levy an all-inclusive revenue measure rather than to levy a tax upon merely those possessing the privilege of exercising the electoral franchise.

Were the tax in question levied for the privilege of voting, it is difficult to see just why the legislature should have excepted such a large class of the voters of Tennessee from its operations. Persons more than 50 years of age are not liable for the tax under the statute but vote with impunity in all elections held, without the payment of such tax. Likewise, persons physically incapable of labor may have themselves declared exempted from the levy of this tax, yet such persons when so exempted by proper judicial proceedings may vote to the same extent as though they had paid such tax.

But the factor which to this respondent seems most conclusive as to the soundness of our contentions as to the nature of the tax is to be found in the fact that any person liable for such tax remains liable therefor whether or not such person exercises his or her electoral franchise. Were this a tax upon the privilege of voting, it is inconceivable that liability would be fixed regardless of the exercise of the privilege. Ordinarily, a privilege, license, or excise tax is levied upon the performance of some act, and in the absence of a performance of such particular act, no tax liability accrues.

Then too, this tax is applicable to a vast number of persons who are not qualified voters. Aliens, persons deprived of citizenship, and persons not possessing the residential qualification required for the exercise of the electoral franchise nevertheless are liable for this tax. It seems to this respondent that this fact likewise demonstrates that the tax in question is not a tax on the privilege of voting or on voters as a class.

Then too, in considering whether or not the tax in question is a tax upon a right guaranteed by the Constitution of the United States, it should be noted that there is but one assessment of the tax annually. Such assessment is in a fixed amount. The payment of the tax by the otherwise qualified voter entitles him to participate in *all* elections. There is no requirement that an additional sum be prepaid for the privilege of participating in elections for federal officers. Stated differently, if the otherwise qualified elector pays his poll tax, he may participate in all elections both state and national but conversely, if he fails to pay such poll tax, he may not cast his ballot at any election regardless of its nature.

The proximity of the constitutional and statutory provisions to other taxing statutes frequently affords evidence of the legislative intent. As before stated, the provisions levying this tax are to be found in connection with the revenue laws of this state. The disqualification provisions are found in the section of the statutes dealing with elections. In this connection we call to the attention of the Court the case of *Re Opinion of the Justices*, 11 Pick., 538, wherein passing upon a similar question, the Supreme Court of Massachusetts considered the matter in the following language:

> "But we think the tax act will not justly admit of this construction. It must be considered, that the liability to taxation, and the political privilege of voting, consequent thereon, are established by different acts, at different periods, and having distinct objects in view. Each must be construed by itself. The purpose of the tax act is revenue; it is to lay a burden and charge upon the persons and property of the peo-

ple, to provide funds for public objects. The privilege of voting, consequent thereon, is incidental and collateral, established by a distinct constitutional provision, and is not to be regarded as one of the purposes and designed effects of the act. Such effect, therefore, cannot be much regarded in its construction."

It seems much more plausible to reach the conclusion that the statute in question was enacted as a revenue measure and that the disqualification for failing to pay it was merely incidental and a more effective method of collection. For the first time by the Constitution of 1870 of Tennessee, the amount of this tax was definitely fixed between certain limits. For the first time by the Constitution, its payment was made a prerequisite to voting and likewise, for the first time in that instrument, the cause of education in Tennessee as a state function was definitely undertaken and the proceeds of this tax irrevocably appropriated to that cause. In other words, from these three constitutional provisions, it is our insistence that a scheme for the propagation of education is clearly set forth and that the provisions are but component parts of the same scheme having as its purpose the advancement of public education in Tennessee. By the first part of the plan the tax was levied and fixed at a definite amount considerably in excess of that theretofore levied. By the second part of the plan its collection was to be facilitated by making its prepayment necessary to the exercise of the electoral franchise and by the third part of the plan, all the proceeds thereof were irrevocably dedicated to the cause of education.

In addition thereto, the collection of poll taxes seems to have been a favorite subject of the Tennessee Legislature.

In addition to the above devised method for their collection, we respectfully call to the attention of the Court, Section 1559 of the Code above mention forbidding the collection of ad valorem taxes without the payment of poll tax at the same time.

Now then, when these matters are considered and when the further fact is considered that a statute will not be construed so as to raise serious doubts as to its validity, if another construction be reasonably possible, we respectfully insist that this statute should not be construed as contended for by the appellant. Substantially he asks that this Court give to the statute a construction which might raise grave doubts as to its validity, in the face of canons of construction to the contrary. The statute is perfectly capable of a different construction.

This statute is thoroughly capable of the construction contended for by this respondent. The poll tax in Tennessee was levied prior to the adoption of the provisions providing for disqualification for non-payment thereof. Since this provision for disqualification was added long after the adoption of the poll tax in Tennessee, the presumption seems almost irresistible that where the tax was originally levied for revenue purposes, that continued to be the purpose of the legislature in imposing such taxes and that the provisions for disqualification for non-payment constituted merely an effort upon the part of the legislature to provide for the more effective collection of this tax.

The effectiveness of the scheme adopted by the State of Tennessee may be noted from the following figures issued by the Commissioner of Education of Tennessee, the official in charge of the distribution of school funds. In Ten-

nessee poll taxes for any particular year become delinquent on March 1 of the year following that for which they are assessed. Likewise, to vote, the poll tax of the preceding year must have been paid. Code of Tennessee, Section 2038. Elections in Tennessee, both state and national, are held in the even numbered years. Code of Tennessee, Sections 1919, 1928.

Thus, it may be seen that to vote in an election held in Tennessee during the even numbered years, the poll tax for the odd numbered years must have been paid. The collection of poll taxes in Tennessee for a substantial period antedating the filing of this suit were as follows:

For the Year	*Poll Taxes Collected*
1934	$292,849.02
1935	650,411.31
1936	315,712.58
1937	706,266.60
1938	360,087.83
1939	722,168.98

From the above statistics, it can be seen that the requirement that such tax be prepaid results in the State of Tennessee collecting twice the normal amount from poll taxes for those years for which prepayment thereof is a condition precedent to the exercise of the electoral franchise and demonstrates rather definitely the effectiveness of the method adopted by the legislature.

We, therefore, respectfully insist that under proper rules of construction the statute in question constitutes a revenue measure with merely incidental disqualification for failure to pay such poll tax and that it should not be con-

strued as a statute levying a tax upon the right to vote. But little notice need be taken of the authority cited on behalf of petitioner to the effect that statutes levying poll taxes are intended to levy a tax upon the privilege of voting. That authority is *Ratliff* v. *Beale*, 74 Miss., 247, 20 So., 865. The opinion of the Supreme Court of Mississippi bases its decision upon the prior history of that state and certain facts judicially known to it, none of which are present in the present case, as well as the debates of the constitutional convention of that state authorizing the levy of such tax. More appropriate to the present situation is the language of the Supreme Court of Arkansas in the case of *Whitaker* v. *Watson*, 68 Ark., 555, 60 S. W., 651, 654, as follows:

> "We conceive the object and intent of this provision of the constitution to be not only to induce the citizen to whom the right of suffrage is granted to contribute to the support of the common schools, for which the tax is levied, *but to exclude from voting the citizen who does not take an interest in the welfare of his country or value his vote sufficiently to pay a poll tax.*" (Italics ours.)

IV AND V.

At the beginning of this argument, let it be definitely understood that the respondent does not contend that the right to vote for members of the House of Representatives does not have its origin in the Constitution of the United States and, therefore, does not constitute a federal right. The present case, however, presents a different situation and deals primarily with the right of the state to impose qualifications touching the exercise of such right. It must be remembered that, under existing authorities, it has been held by this Court, upon numerous occasions, that the Con-

stitution of the United States does not guarantee universal suffrage but that on the contrary, the general grant of suffrage emanates from the states. See *Breedlove* v. *Suttles*, 302 U. S., 277; *Guinn* v. *U. S.*, 238 U. S., 362; *Pope* v. *Williams*, 193 U. S., 621; and *Minor* v. *Happersett*, 21 Wall., 162.

When we come to the question of the right to vote for members of the House of Representatives, the constitutional provision involved is Section 2, Article I. This provides as follows:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

From a consideration of the above provision, it may be observed that the Constitution of the United States contains no provision specifically fixing the qualifications of electors for members of Congress but that in lieu thereof, it adopts as such qualifications, those fixed by the state for electors for the most numerous branch of such state legislature.

That this is the correct construction of this constitutional provision appears from the following excerpt from *Ex Parte Yarbrough*, 110 U. S., 651, as follows:

> "*The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress.* Nor can they prescribe the qualifications for voters for those *eo nomine*. *They*

define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend *exclusively* on the law of the state." (Italics ours.)

When the case relied upon by the petitioner (including *U. S.* v. *Classic, et al., supra*), are analyzed, it will be noted that each of them deal with cases where the elector was qualified and there was an attempt to interfere with his exercise of his constitutional right to cast his ballot for members of the House of Representatives, in which case beyond peradventure, he was obstructed in the effort to exercise a federal right. The present case differs radically from such cases. It in effect is an effort to review and revise the action of the state legislature in fixing the qualifications for electors for the most numerous branch of the state legislature merely because such qualifications as are fixed for electors for the most numerous branch of the state legislature automatically become the qualifications of electors for members of the House of Representatives.

Of course, *Breedlove* v. *Suttles, supra,* if followed in the present case, definitely controls its disposition and would require an affirmance of the judgment of the lower court but *Breedlove* v. *Suttles, supra,* is rather severely criticized by counsel for petitioner by virtue of the use of an expression which has been characterized by this Court in a later case as having been used in a loose sense (*U. S.* v. *Classic,*

et al., supra). The expression in question is the statement to the effect that the privilege of voting is not derived from the United States but is conferred by the states. It is true that this expression is not accurate so far as the right to vote for members of the House of Representatives is concerned but is applicable to the general grant of suffrage. *Breedlove* v. *Suttles, supra,* is likewise criticized because the opinion does not mention Article I, Section 2 of the Constitution of the United States. It is true that it does not mention this constitutional provision in so many words but it does cite as one of the cases relied upon, the case of *Ex Parte Yarbrough, supra,* which does cite the particular constitutional provision. The presumption should exist that *Ex Parte Yarbrough, supra,* was not cited in the opinion of the Court in the later case without a careful reading thereof, which careful reading would have called to the attention of the Justice preparing the opinion the particular provision in question.

It is our insistence that from the very nature of things, the requirement that poll tax be prepaid does not constitute a tax upon a federal right. As above stated in a foregoing part of this brief, the party seeking to vote for members of Congress does not attain the status of a federal elector until he shall have met the requirements imposed by the State for electors for members of the most numerous branch of the State Legislature. In Tennessee to so qualify he must be of the age of 21 years, a resident of the State for twelve months next and of the county in which he offers to vote for six months preceding the date of such election and must have paid his poll tax, if legally liable therefor, sixty days prior to the date of such election at which he offers to vote. Until he shall have paid his poll tax, if liable therefor, at least sixty days prior to the date of the election in

question, he does not attain the status of an elector under the state law and is not qualified to vote for members of the most numerous branch of the State Legislature and since he only becomes an elector for members of Congress when he shall possess the qualifications necessary to constitute him an elector for the most numerous house of the State Legislature, it follows naturally that he never attains the status of an elector for members of Congress until he first shall have paid the poll tax assessed against him and shall give to the judges of election due proof of his payment thereof. The tax is not levied upon him after he shall have become an elector for members of Congress. He is subject to no tax by virtue of that status but on the contrary, he is taxed by virtue of the fact that he is an inhabitant of the State of Tennessee and to facilitate collection of the tax and for other purposes, he is required to present evidence of his payment thereof before being permitted to become an elector for the most numerous house of the State Legislature.

VI.

The latest expression of this Court dealing with this question is that of *United States* v. *Classic, et al., supra.* It is our insistence that this opinion clearly recognizes the right of the states to legislate upon the subject of qualifications of the voters, not directly but through the indirect medium of fixing the qualifications for the electors of the most numerous branch of their own legislature and that instead of this case constituting an authority in favor of the petitioner, in reality, it recognizes the principle for which the respondent contends.

From it, we quote the following:

> "Article I, Sec. 2 of the Constitution, commands that 'The House of Representatives shall be composed of members chosen every second year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature.' By Sec. 4 of the same article 'The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators.' Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is *thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by Sec. 2* and to the authority conferred on Congress by Sec. 4, to regulate the times, places and manner of holding elections for representatives." (Italics ours.)

It will be noticed from the above excerpt that first the right is stated to be guaranteed only to *qualified* voters and secondly, it is to be exercised in conformity to the requirements of state law subject to the restrictions provided by Article I, Sec. 2 of the Constitution of the United States.

Likewise, in this same opinion, we find the following language:

> "Pursuant to the authority given by Sec. 2 of Article I of the Constitution, and subject to the legislative power of Congress under Sec. 4 of Article I, and other pertinent provisions of the Constitution, *the states are*

given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." (Italics ours.)

This excerpt from the opinion clearly recognizes that the states are given an exercise of wide discretion in the power reserved to them by the Constitution of the United States. For instance, prior to the adoption of the Nineteenth Amendment, some states granted to women the privilege of voting, while others denied them this same privilege. Yet, there was no denial of any constitutional right in this respect upon the part of the states declining to grant suffrage to females. Likewise, although the age of 21 years is the customary one at which persons are permitted to vote for the first time, if a state should, in the exercise of its discretion, determine that no person under the age of 35, or any other age that might appeal to the discretion of the legislature, should be permitted to cast a ballot as elector for the most numerous branch of the state legislature, could it be said that such action on the part of the legislative body of the state in question violated any constitutional rights of those who had not attained the required age. Or, should a state through its proper authority determine that a property qualification should be a prerequisite to voting for members of the most numerous branch of its own legislature and refuse to permit those without property so to vote, could it be said that its action violated constitutional rights.

The answer is that since the state has a wide discretion, restrained only by the Constitution of the United States in fixing the qualifications for the most numerous branch of its state legislature, the suggested qualifications could

not be stricken down because no where do they infringe upon the Federal Constitution.

It is suggested in the argument on behalf of petitioner that to require the prepayment of poll tax as a condition precedent for voting savors of a sale of the electoral franchise and that such should be discountenanced by this Court. Likewise, it is said that the prepayment of a tax does not constitute a qualification within the proper meaning of that word as used in the Constitution of the United States.

The respondent is of the opinion that there are two answers to these contentions: first, that the state legislature themselves are the judges of the proper qualifications when they legislate, since they do not legislate directly with reference to the qualifications of electors for members of the House of Representatives, but on the contrary, legislate directly with reference to qualifications of the members of the most numerous branch of the legislature. *Ex Parte Yarbrough, supra.*

Since, therefore, they legislate with reference to matters over which they alone have jurisdiction, their right to fix such qualifications must be tested primarily by their own judgment and discretion.

The second answer to this contention is the admitted fact that at the time of the adoption of the Federal Constitution and its ratification by the original thirteen states, nine of such states required either a property qualification or the payment of taxes as a condition precedent to the exercise of the electoral franchise. These states were Massachusetts, Connecticut, New York, Pennsylvania, New Jer-

sey, Maryland, North Carolina, South Carolina and Georgia.

Minor v. *Happersett, supra.*

Thus, if at the time of the adoption of the Constitution either a property qualification or prepayment of taxes were a condition precedent to the electoral franchise, in the majority of the states ratifying such, it can not be said with any degree of plausibility that the framers of the Constitution did not contemplate that the legislatures of the several states might not require the prepayment of taxes as a qualification for electors for the most numerous branch of its own state legislature.

Finally, from *U. S.* v. *Classic, et al., supra,* we quote the following language:

> "Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its *exercise is prescribed by state action in conformity to the Constitution,* is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex Parte Yarbrough,* 110 U. S., 651; *United States* v. *Mosley,* 238 U. S., 383. And see *Hague* v. *C. I. O.,* 307 U. S., 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase 'rights' 'secured by the Constitution' appearing in Sec. 1 of the Civil Rights Act of 1871, 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see,

Minor v. *Happersett*, 21 Wall., 162, 170; *United States* v. *Reese*, 92 U. S., 214, 217-218; *McPherson* v. *Blacker*, 146 U. S., 1, 38-39; *Breedlove* v. *Suttles*, 302 U. S., 277, 283, *this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by Sec. 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under Sec. 4* and its more general power under Article I, Sec. 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' See *Ex Parte Siebold*, 100 U. S., 37; *Ex Parte Yarbrough*, *supra*, 663, 664; *Swafford* v. *Templeton*, 185 U. S., 487; *Wiley* v. *Sinkler*, 179 U. S., 58, 64." (Italics ours.)

The underscored language recognizes the right of the states to legislate upon the subject (the qualification of electors) as provided by Section 2 of Article I and thus it is the insistence of the respondent that the latest expression of this Court upon the subject recognizes clearly the right of the state to provide the qualifications it deems requisite for electors for the most numerous branch of its own legislature.

As shown above, the requirement of the prepayment of tax is by no means a recent one. It was in force in a number of the states at the time of the ratification of the Constitution of the United States and if a state desires to make the payment of a tax a qualification, respondent respectfully insists that there is nothing in the Federal Constitution prohibiting such, especially in view of the fact that the states do not fix directly the qualifications of electors for members of the House of Representatives but merely fix

the qualifications for those entitled to vote for the most numerous branch of their own legislature.

VII.

As stated in *Pope* v. *Williams, supra,* the question as to whether the contentions prescribed by the state might be regarded by others as reasonable or unreasonable is not a federal question. A number of cases holding directly or by necessary inference that the requirement of prepayment of tax is reasonable and violates no constitutional right are set forth in the *Points of Law, supra,* and will not be repeated here. Suffice it to say, *Breedlove* v. *Suttles, supra,* decides this question directly in favor of the contention of the respondent despite the efforts of counsel for petitioner to distinguish such from the present case.

VIII.

Finally, we come to the question as to whether or not the requirement of prepayment of a tax constitutes a tax upon a federal right. Perhaps no topic of the law has received more careful consideration in recent years at the hands of this Court than the extent to which states may levy a tax upon federal instrumentalities or federal rights. Originally the slightest matter that savored of a federal right or instrumentality was held exempt from taxation by the states but this doctrine of immunity has been narrowed by appropriate recent decisions of this Court.

The rule by which the validity of a state tax is tested has been variously stated in recent opinions of this Court. In *Educational Films Corp.* v. *Ward,* 282 U. S., 379, 391, we find the following language:

"This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other."

In *Fox Film Company* v. *Doyal*, 286 U. S., 123, 128, we find the rule stated thusly:

"The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland*, 4 Wheat., 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' *Indian Motorcycle Co.* v. *United States*, 283 U. S., 570, 576, 579. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson* v. *Maryland*, 254 U. S., 51, 55, 56), *but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of*

government.' Willcuts v. *Bunn,* 282 U. S., 216, 225." (Italics ours.)

Likewise, in *Pacific Company* v. *Johnson,* 285 U. S., 480, 493, we find the following language:

> "Thus, in our dual system of government, action of the one government in the proper exercise of its sovereign powers, regarded as innocuous and permissible notwithstanding its incidental effects on the other, may become offensive and be deemed forbidden if it discriminates against the other. State taxes which, if nondiscriminatory, would be upheld, even though they reach or affect those engaged in interstate commerce, are condemned if they discriminate against those so engaged, by placing on them heavier burdens than those imposed on others within the state."

Finally, in the concurring opinion of Mr. Justice Frankfurter in *Graves* v. *New York,* 306 U. S., 486, 488, we find the rule stated in the following language:

> "But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government."

We think the true rule deducible from the above quoted opinions of this Court is that a tax upon federal instrumentalities or federal rights, to conflict with the doctrine of inter-governmental immunity must be of such a nature as to impede or obstruct the legitimate functions of the government sought to be taxed and that a non-discriminatory tax will not be stricken down by this Court although it may indirectly affect the income from or exercise of a federal right.

In the present case, the provisions under consideration levy no tax against the Federal Government or any instrumentality thereof or right claimed in connection therewith. The Federal Government will not be caused to expend any of its revenues by virtue of these taxing statutes.

When we consider the effect on a person liable for such tax, it will be seen that there is no conscious effort to require him to pay a tax for the exercise of the federal right. He pays a flat non-discriminatory tax of $2.00 per annum. His tax burden is not increased by the exercise of his federal right of suffrage but on the contrary, remains the same whether he exercise such right or not. Surely, it can not be said; therefore, that the tax in question contains any discriminatory features levelled at the Federal Government.

Finally, the tax liability of the person liable for such tax remains the same whether he exercise such federal right or the reverse because, as above stated, his liability for this tax is not abated by his failure to exercise his elective franchise.

If, therefore, the taxes which a state may not lawfully levy are those which obstruct and impede the operation of the Federal Government and its instrumentalities, can it be said with any degree of plausibility that the tax in the

present case falls within that class. No function of the Federal Government is obstructed by the levy of this tax. The tax is not levied directly upon the exercise of any federal right but on the contrary, it is levied directly upon the person liable therefor and the effect upon the Federal Government is so inconsequential and remote as to bring it well within the rule of practical application stressed by this Court in *Educational Films Corp.* v. *Ward, supra,* and reaffirmed in the concurring opinion of Mr. Justice Frankfurter in *Graves* v. *New York, supra.* The tax in question neither cripples nor impedes in the slightest degree the functions of the Federal Government in its sphere of action. Its effect upon the exercise of the constitutional right to vote for members of the House of Representatives is also remote and indirect and, therefore, we respectfully insist that it does not constitute a tax upon a federal right or privilege.

In conclusion, we earnestly insist that the petition for *certiorari* should not be granted by this Court, or in the alternative, if granted, that the judgment of the Circuit Court of Appeals of the Sixth Circuit was correct and should be affirmed.

Respectfully submitted,

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APPENDIX.

For the convenience of the Court, we have prepared an appendix to this brief, containing the constitutional provisions and statutes of Tennessee referred to herein.

ARTICLE II, SECTION 28.

"All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

ARTICLE IV, SECTION 1.

"Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the General Assembly, and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law, without which his vote cannot be received."

ARTICLE XI, SECTION 12.

"The State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall, from time to time, direct by law."

CODE OF TENNESSEE, SECTION 1082.

"Every inhabitant between the ages of twenty-one and fifty years, except persons who are deaf, dumb, blind or in-

capable of labor and of earning a livelihood, shall pay an annual poll tax of one dollar for school purposes, which shall be collected by the trustee of the county and retained in the county where collected and apportioned to the schools of said county in the manner prescribed by law. Liabiliy for poll tax and the exemption therefrom is determined and fixed according to the age of the inhabitant, on the tenth day of January of each year."

CODE OF TENNESSEE, SECTION 1083.

"Any person incapable of labor, wishing to have himself declared exempt from the poll tax, shall apply to the quarterly county court by petition, stating the ground of his claim thereto; and if the court, upon hearing the petition and the testimony produced before them, be of opinion that the petitioner is incapable of labor, they shall declare him to be so, of record; and the production of a copy of the same, duly authenticated, to the collector, shall be his authority for omitting to collect the poll tax from such person."

CODE OF TENNESSEE, SECTION 1559.

"Every taxpayer shall pay his poll tax, if liable for poll tax, at or before the time he pays his property tax. No trustee shall receive from any taxpayer his property tax and receipt him therefor until his poll tax is paid, if liable for poll tax.

"Every trustee who violates this section or permits it to be violated by any of his deputies shall be held liable for all poll taxes that may become delinquent on account of such violation, and any auditor may proceed against such trustee who shall receive from any taxpayer his property tax and receipt him therefor before his poll tax is paid, if liable for poll tax; provided, the trustee shall not enforce this section where the taxpayer in good faith claims that he is not liable for the payment of a poll. Also, he shall be held liable for all poll taxes that may become delinquent on account of such violation, and any auditor may proceed against such trustee as a delinquent revenue collector."

CODE OF TENNESSEE, SECTION 2027.

"Every person in this state, who is otherwise a qualified voter under the constitution and laws, shall, as a condition precedent to the exercise of voting, furnish to the judges of election satisfactory evidence that he has paid the poll tax, if any, assessed against him for the year next preceding the election, not later than sixty days prior to the day of said election, without which his vote shall not be received; provided, if any voter has been wrongfully assessed for such poll tax, this article shall not apply to him."

CODE OF TENNESSEE, SECTION 2030.

"The satisfactory evidence of the voter's payment of his poll tax may consist of the fact that his name appears upon the certified list of voters of his voting precinct, which list, as well as one for each district in the county, is to be made out and furnished by the trustee of each county to the chairman of the board of election commissioners of said counties, giving the name of each voter of the respective districts who has paid his poll tax, said lists to be made out and delivered to the chairman of the board of election commissioners fifty days before any general election, and by him delivered to the judges holding the election on or before the opening of the polls on election day."